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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

CAMPION MURPHY et al.,  
Plaintiffs and Appellants,

v.

QUILLIN & GRANT, INC., et al.,  
Defendants and Respondents.

B214123

(Los Angeles County  
Super. Ct. No. BC388329)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Elizabeth A. Grimes, Judge. Affirmed.

Charles E. Ruben & Assoc., Chris L. Christenson; and Robert D. Feighner for  
Plaintiffs and Appellants.

Robie & Matthai, Edith R. Matthai, Natalie A. Kouyoumdjian, Ivan  
Mnatzaganian, for Defendants and Respondents, Lexington Financial Management, LLC,  
Gettleison, Witzer & Co., Harvey Gettleison, and Larry Witzer.

No appearance by Defendant and Respondent, Quillin & Grant, Inc.

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In this breach of contract lawsuit, a first amended complaint brought by plaintiffs and appellants Campion Murphy and Faith Ford Murphy against defendants and respondents Lexington Financial Management, LLC, Gettleson, Witzer & Co., Harvey Gettleson, and Larry Witzer was dismissed following the sustaining of respondents' demurrer without leave to amend.<sup>1</sup> Appellants appeal the judgment, arguing that the trial court erred when it found their claim was time-barred.

We conclude that because appellants had notice of respondents' alleged breach of contract more than two years before their complaint was filed, their claim was barred by the statute of limitations. (Code Civ. Proc., § 339.) The trial court properly sustained respondents' demurrer; the judgment is affirmed.

### **FACTUAL AND PROCEDURAL SUMMARY**

"Because this case comes to us on a demurrer for failure to state a cause of action, we accept as true the well-pleaded allegations in [appellants'] first amended complaint. . . . "We also consider matters which may be judicially noticed." [Citation.]'" (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.) The following factual summary is taken from the charging pleading and from judicially noticeable sources.

In or around 2000, respondents orally agreed to serve as appellants' business managers in return for five percent of the income generated by Faith Ford Murphy. In 2004, appellants hired Quillin & Grant, Inc. (Quillin) to repair water damage to their home, and in May of 2005, Quillin agreed to act as general contractor for an extensive remodel of appellants' home. Appellants discharged Quillin in December 2005, because Quillin failed to complete the work called for in the construction contract. Appellants paid Quillin some \$500,000, and paid a new contractor in excess of \$1 million to repair the work performed by Quillin.

On April 2, 2008, appellants sued Quillin and respondents for claims arising from the defective repair and construction of their home. Appellants alleged negligence,

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<sup>1</sup> There is no appearance by Quillin & Grant, Inc., doing business as Quillin Maintenance.

breach of fiduciary duty, and breach of contract against respondents, in connection with their failure to adequately supervise and manage Quillin's performance. Respondents demurred, arguing appellants sustained actual injury and discovered respondents' negligence when they discharged Quillin in December 2005, more than two years before the filing of their complaint. The trial court sustained the demurrer as to appellants' causes of action for negligence and breach of fiduciary duty without leave to amend, finding them time-barred. The trial court granted leave to amend the cause of action for breach of contract, allowing appellants to produce a written contract so the court could determine whether that cause of action was timely.<sup>2</sup>

In September of 2008, appellants filed a first amended complaint. They did not produce a written contract, but amended their complaint to claim breach of an implied term in an oral management contract, requiring respondents to disclose to appellants all pertinent legal advice respondents received from appellants' attorneys. Appellants' attorney Larry Greaves e-mailed respondents in 2004 about the contract with Quillin, stating that he "assume[d] you have discussed with the client the dangers inherent in working without a guaranteed maximum price." Respondents never disclosed this statement, and approved a contract with Quillin with terms less protective than Greaves implicitly advised in his 2004 e-mail. Appellants first discovered the Greaves e-mail in May of 2008. In the amended complaint, appellants alleged this failure to disclose legal advice as the sole basis for their breach of contract claim against respondents.

Respondents demurred to the amended complaint, arguing that the breach of contract claim was time-barred regardless of appellant's allegation that respondent failed to communicate legal advice. The trial court sustained the demurrer without leave to amend. Appellants timely appealed from the judgment.

### **DISCUSSION**

"[W]e review the [amended] complaint de novo to determine whether it contains sufficient facts to state a cause of action." (*Grinzi v. San Diego Hospice Corp.* (2004))

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<sup>2</sup> Code of Civil Procedure section 337 requires actions on written contracts to be filed within four years.

120 Cal.App.4th 72, 78.) However, “‘a pleading valid on its face may nevertheless be subject to demurrer when matters judicially noticed by the court render the complaint meritless.’ [Citation.]” (*McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 290.) Appellants filed their amended complaint against respondent more than two years after Quillin was fired, but claim their cause of action did not accrue until they learned of the Greaves e-mail. They argue that their amended complaint should not be suppressed as an untruthful sham pleading that omitted facts alleged in the original complaint. The issue is not whether the new claim was truthful, but whether it was timely.

Appellants concede that a two-year statute of limitations applies to the cause of action for breach of oral contract dismissed by the trial court. But, they argue the core allegations supporting their amended claim are distinct from those establishing their breach of contract claim in the original complaint. Rather than basing their amended claim on respondents’ supervision of Quillin’s performance, appellants allege that respondents’ failure to disclose legal advice pertaining to the construction contract violated the oral business management agreement. As they did not discover this breach until May of 2008, appellants contend their amended complaint is not barred by the statute of limitations.

“Under the statute of limitations, a plaintiff must bring a cause of action within the limitations period applicable thereto after accrual of the cause of action.” (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397.) Code of Civil Procedure section 339 requires that an action on a contract not founded upon a writing be brought within two years, “provided, that the cause of action . . . shall not be deemed to have accrued until the discovery of the loss or damage suffered by the aggrieved party thereunder.” (Code Civ. Proc., § 339.) The “discovery rule” postpones accrual of a cause of action until a potential plaintiff suspects a factual basis for a cause of action, even if he lacks knowledge thereof, or “at least ‘suspects . . . that someone has done something wrong’ to him. [Citation.]” (*Norgart v. Upjohn Co.*, *supra*, 21 Cal.4th at p. 397.) However, “[t]he discovery rule only delays accrual until the plaintiff has, or should have, inquiry notice of the cause of action.” (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 807.)

Later discovered facts do not toll the accrual of a cause of action. (*Curtis v. Kellogg & Andelson* (1999) 73 Cal.App.4th 492, 500-501 [finding that fraudulent concealment of facts showing wrongdoing does not toll statute of limitations beyond when the plaintiff became aware of the necessary facts linking a defendant to the harm].)

Respondents' failure to disclose legal advice regarding the Quillin contract was a dereliction of their business management obligations under the oral contract. Appellants' amended complaint does not incorporate the allegations in the original complaint. However, we take judicial notice that the original complaint alleged that respondents breached the agreement by failing to hire a construction manager to supervise the work, failing to inspect and supervise Quillin's work, authorizing the payment of invoices to Quillin, and recommending that appellants continue utilizing Quillin as a general contractor after they knew or should have known about problems with the project. Respondents' failure to disclose legal advice about the Quillin contract, and approval of terms less restrictive than those recommended by appellants' attorneys, is a factual allegation that is part of the evidence that respondents breached the oral contract through their mismanagement of the home remodeling project. (Cf. *Berman v. Bromberg* (1997) 56 Cal.App.4th 936, 949 [finding amendment proper where "plaintiff seeks to change his legal theory of recovery and the legal conclusions he seeks to draw" from same underlying facts alleged in original complaint].) Appellants' discovery of an additional fact showing breach did not change when their cause of action accrued or toll the two-year statute of limitations. (*Curtis v. Kellogg & Andelson, supra*, 73 Cal.App.4th at pp. 500-501.)

Appellants "'learn[ed] or should have learned, the *facts* essential to [their] claim'" against respondents for breach of contract when they discharged Quillin in December 2005; their cause of action accrued at that time regardless of evidence of additional wrongdoing found during discovery. (*Fox v. Ethicon Endo-Surgery, Inc., supra*, 35 Cal.4th at p. 807.) Since appellants filed their claim for breach of contract in April of 2008, more than two years after their cause of action accrued, it was barred by the statute

of limitations. The amended complaint was filed in September of 2008; it too was time-barred.

Appellants were not able to cure this defect because they did not produce a written contract with respondents, as contemplated by the order sustaining the demurrer to the original complaint.<sup>3</sup> As the allegations in the amended complaint did not state a cause of action under any legal theory, the judgment sustaining the demurrer is affirmed. (*Grinzi v. San Diego Hospice Corp.*, *supra*, 120 Cal.App.4th at p. 85.)

### **DISPOSITION**

We affirm the judgment. Respondents to have their costs on appeal.

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EPSTEIN, P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.

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<sup>3</sup> Appellants contend that the trial court's dismissal of their causes of action for negligence and breach of fiduciary duty should be reversed because respondents' failure to disclose legal advice satisfies the duty element of those causes of action as well. The trial court sustained respondents' demurrer to those causes of action because they were time-barred. For the same reason that the discovery of an additional fact showing breach of the oral management contract did not toll the statute of limitations on the breach of contract cause of action, the negligence and breach of fiduciary duty claims also are time-barred.